THE ATTORNEY GENERAL
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Honorable Paul Spillman
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Collingsworth County
916 West Avenue
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Opinion NO. M-1160

Re: Interpretation of the phrase "knowingly make available" an alcoholic beverage to a minor as contained in Article 666-17 (14) (b), Vernon's Penal Code.

Dear Mr. Spillman:

You have requested an opinion of the Attorney General of Texas in reference to the following presented question:

> "I would like to have the interpretation of the words -- knowingly make available to -- as the same are used in Article 666-17 (14-B) of the Vernon Penal Code of the State of Texas."

You further presented two (2) hypothetical fact situations or examples involving the presence of a minor in an automobile containing alcoholic beverages in the possession of an adult. We will confine this opinion to the question presented as our conclusion will, in all probability, assist you in analyzing the fact situations.

Article 666-17, Subdivision (14) (b) is a provision of the Texas Liquor Control Act and was enacted in its present form in 1969 (61st Leg. R.S., 1969, ch. 38, p. 80). It provides as follows:

> "It shall be unlawful to purchase an alcoholic beverage for or give, or knowingly make available, an alcoholic beverage to a person under the age of twenty-one (21) years unless the purchaser, person making available, or giver is the parent, legal guardian, adult husband or adult wife of the person for whom

> the alcoholic beverage is purchased, made available, or to whom it is given. A person who violates a provision of this paragraph is guilty of a misdemeanor and upon conviction is punishable by a fine of not less than One Hundred Dollars ($100) nor more than Five Hundred Dollars ($500)." (Emphasis added).

Your inquiry actually raises two questions, to-wit: (1) what is meant by "knowingly making available" an alcoholic beverage to a minor, and (2) is knowledge of the age of the minor an element of the offense of knowingly making available an alcoholic beverage to a minor?

The word "knowingly", when used as a part of the statutory definition of a criminal offense, has been stated to have no single fixed meaning. Finn v. United States, 256 F.2d 304 (4th Cir. 1958). In most instances its meaning rests upon the character of the offense charged. State v. Contreras, 253 A.2d 612 (R.I.Sup. 1969); R. D. Lowrance, Inc. v. Peterson, 185 Neb. 679, 178 N.W.2d 277 (1970). "Knowingly" in the criminal sense has been stated to mean that a person, knowing about what he is doing, does so wilfully, intentionally and understandingly. Commonwealth v. Althenhaus, 317 Mass. 270, 57 N.E.2d 921 (1944); Rose v. State Board of Registration for the Healing Arts, 397 S.W.2d 570 (Mo.Sup. 1965); United States v. Martinez, 73 F.Supp. 403 (M.D.Pa. 1947); United States v. Smith, 249 F.Supp. 515 (S.D.Idaho 1966); Standard Oil Co. of Texas v. United States, 307 F.2d 120 (5th Cir. 1962).

"Knowingly" is sometimes used as synonymous and in conjunction with "wilfully". Garza v. State, 47 S.W. 983 (Tex. Crim. 1898); Good v. Commonwealth, 155 Va. 996, 154 S.E. 477 (1930); People v. Odom, 19 Cal.App.2d 641, 66 P.2d 206 (1937); Lamb v. State, 293 P.2d 624 (Okla.Crim. 1956); State v. Booton, 85 Idaho 44, 375 P.2d 536 (1962); United States v. Molin, 244 F.Supp. 1015 (D.Mass. 1965). It has also been used in the sense of "intentionally". Cheffer v. Eagle Discount Stamp Co., 156 S.W.2d 591 (Mo.Sup. 1941); Commonwealth v. Sarricks, 161 Pa.Sup. 577, 56 A.2d 323 (1948); United States v. Loveknit Mfg. Co., 90 F.Supp. 679 (N.D.Tex. 1950).

"Available" has a general, common meaning -- capable of being made use of, or accessible. Nemo v. State, 178 Misc. 286, 34 N.Y.S.2d 40 (1942); Brown v. State, 200 Miss. 881, 27 So.2d 838 (1946); Garrison Independent School District v. McDuffie, 414 S.W.2d 492 (Tex.Civ.App. 1967, error ref. n.r.e.); Duncan v. United States, 368 F.2d 98 (5th Cir. 1966).

"Knowingly" appears to be the key word in the statute under inquiry. This word has been stated to describe a conscious and deliberate quality which negates accident, inadvertance, mistake, or other innocent reason. United States v. Schneiderman, 102 F.Supp. 87 (S.D.Calif. 1951); People v. Crean, 206 Misc. 314, 136 N.Y.S.2d 688 (1954); People v. Raby, 40 Ill.2d 392, 240 N.E.2d 595 (1968); State v. Contreras, supra; Landry v. Daley, 280 F.Supp. 938 (N.D.Ill. 1968); Popeko v. United States, 294 F.2d 168 (5th Cir. 1961); Fromberg, Inc. v. Thornhill, 315 F.2d 407 (5th Cir. 1963). "Knowingly", when used in a criminal statute, imports culpable intent as a necessary element of the offense. Erby v. State, 181 Tenn. 647, 184 S.W.2d 14 (1944); People v. McHugh, 271 App.Div. 135, 63 N.Y.S.2d 319 (1946); State v. Kelley, 225 La. 495, 73 So.2d 437 (1954); Graves v. United States, 252 F.2d 878 (9th Cir. 1958); Felton v. United States, 96 U.S. 699 (1878).

From an analysis of the decisional authority above and in response to the first portion of your inquiry, in order to be convicted of the offense of making an alcoholic beverage available to a minor under Article 666-17, Subdivision (14) (b), the alcohol must be made accessible to the minor. In addition, and most importantly, the person charged must have, with a culpable motive, intentionally and deliberately, placed an alcoholic beverage where it is accessible to the minor with the intent that the minor partake of the beverage. The use of the word "knowingly" in a criminal statute narrows the scope of the enactment by exempting innocent or inadvertent conduct from its proscription. Landry v. Daley, supra. "Knowingly" imports something more than carelessness and signifies guilty knowledge, evil or bad intent. People v. McHugh, supra. The statute would not cover a situation in which the alcoholic beverage was made accessible to the minor "unwittingly", "unconsciously", or through accident, carelessness, or mistake.

For example, in Simpson v. State, 151 S.W. 303 (Tex.Crim. 1912), the minor testified that he was at a gathering at which

the defendant was present. He and the defendant went outside of the yard gate where the defendant picked up a bottle of whisky, took a drink, and placed it by a post. He stepped back a distance and the minor picked up the bottle and took a drink of whisky from it. The Court reversed the conviction stating there was no evidence the defendant gave the minor any intoxicating liquor or told him where it could be found.

In Ethridge v. State, 141 S.W. 89 (Tex.Crim. 1911), the appellant was convicted for "knowingly" giving and delivering intoxicating liquor to a minor. The minor was in a group of adults who were drinking the liquor. When the bottle was placed on the ground, the minor picked it up and took a drink from the bottle. The court had before it the testimony of the minor that "no one told me not to drink the whisky, nor did they in any manner try to stop me; they did not have time; I was too quick for them". The minor further testified that the defendant "did not give his permission for me to drink it". The Court reversed the conviction for insufficient evidence.

The second portion of your inquiry concerns use of the word "knowingly" in connection with "knowledge" of the minority of the person to whom the alcoholic beverage is made available. In order to constitute the offense of knowingly making available an alcoholic beverage to a minor, the evidence must show, not only the minority, but knowledge of that fact on the part of the accused. Earnest v. State, 201 S.W. 175 (Tex.Crim. 1918); Gray v. State, 72 S.W. 169 (Tex.Crim. 1897); Henderson v. State, 38 S.W. 617 (Tex.Crim. 1897); People v. Shapiro, 4 N.Y.2d 597, 152 N.E.2d 65 (1958); Smith v. State, 115 S.W.2d 412 (Tex.Crim. 1938). Mere proof of the age of the minor by the State is insufficient. Gray v. State, supra; Earnest v. State, supra; Smith v. State, supra.

"Knowingly" as used in the statute under consideration does not involve absolute knowledge or intent. United States v. Weisman, 83 F.2d 470 (2nd Cir. 1936). The Court stated in Greenway v. State, 8 Md.App. 194, 259 A.2d 89 (1969), in dealing with the subject of knowledge of a fact, that a defendant cannot deliberately shut his eyes so that he would not have knowledge of what otherwise be obvious to his view. He may be placed on notice of the apparent minority of the person to whom the alcoholic beverage is made available and be required to call for

inquiry. Rosen v. United States, 161 U.S. 30 (1896); Iberville Land Co. v. Amerada Petroleum Corporation, 141 F.2d 384 (5th Cir. 1944).

"Knowingly" has been stated to mean such information as would cause a person of ordinary prudence to make further inquiry. Feldman v. South Carolina Tax Commission, 303 S.C. 49, 26 S.E.2d 22 (1943); cf., American Express Co. v. Commonwealth, 171 Ky. 1, 186 S.W. 887 (1916). In State v. McCormick, 56 Wash. 469, 105 P. 1037 (1909), a Washington Code provided that every person who shall "knowingly" sell or give a minor intoxicating liquors without the written consent of his parent or guardian shall, on conviction, be fined, etc. The Court held that an instruction that the sale was made knowingly within such statute if defendant's bartender knew, or in the exercise of reasonable prudence, should have known that his customer was a minor at the date of the alleged sale, corectly defined the term "knowingly".

Factors that may be taken into consideration and proved by the State to show that a defendant should have known that he was making an alcoholic beverage available to a minor are evidence of age, appearance of the minor, size of the minor, and years known by the defendant. Sears v. State, 34 S.W. 124 (Tex. Crim. 1896). Also, the State may show the minor informed the defendant of his age some time prior thereto. Sturgeon v. State, 176 S.W. 331 (Tex.Crim. 1943). The State may show the minor furnished the defendant with identification showing him to be under twenty-one. Slawson v. State, 276 S.W.2d 811 (Tex. Crim. 1955). The State may use the testimony of a third person that the minor did not appear to him to be twenty-one years of age, but the third person may not testify as to the effect of the minor's appearance on others. Ferguson v. State, 95 S.W. 111 (Tex.Crim. 1900).

S U M M A R Y

In order to be convicted of "knowingly" making an alcoholic beverage available to a minor under Article 666-17, Subdivision (14) (b), Vernon's Penal Code, a defendant must, with awareness and a culpable motive have intentionally and deliberately, placed

said alcoholic beverage where it is accessible to the minor with the intent that the minor partake of the alcoholic beverage.

Further, the person making available the alcoholic beverage must have known that the recipient was a minor or had such information from his appearance or otherwise as would lead a prudent person to believe that such person was a minor, and if followed by inquiry must bring knowledge of that fact home to him.

Yours very truly,

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